**Representing parties to aggregate settlements of individual cases**

This is an elaboration of the material on aggregate settlements that appears in the textbook.

A problem related to the question of conflicts in class actions is that of “aggregate settlements,” in which two or more individual cases are settled simultaneously. When numerous victims are injured by a plane crash, a hazardous product, or some other tort, it is not unusual for one lawyer or one group of lawyers to represent dozens, hundreds, or even thousands of similarly situated plaintiffs in individual, similar lawsuits. The courts generally decline to allow class certification in mass tort cases,[[1]](#footnote-1) so lawyers usually have to handle them individually.[[2]](#footnote-2) The defendants often offer the plaintiff’s lawyer a single large lump sum to settle hundreds or thousands of cases because the defendants would prefer to accept a large loss of a sum certain rather than face many successive jury trials or individual negotiations that could collapse and lead to trials.[[3]](#footnote-3) The defendants then often leave it to the lawyer for the plaintiffs to figure out how to divide up the lump sum among those plaintiffs. Typically, some of the plaintiffs will have greater injuries than others, requiring an allocation that does not simply give an equal amount of money to each plaintiff.

FOR EXAMPLE: A settlement of a mass tort claim against Merck, the maker of the nonsteroidal anti-inflammatory drug Vioxx, provided for payment of $4.85 billion to people who claimed that the drug caused their heart attacks and strokes. The settlement provided that it would not become effective unless 85 percent of the plaintiffs agreed to it, and that the settlement would not apply to the clients of any particular plaintiff’s lawyer unless *all* of that lawyer’s clients agreed to it. A lawyer who had a “holdout” client who did not want to settle would have to terminate representation of that client to enable his other clients to benefit from the settlement. Merck insisted on this arrangement to prevent lawyers from settling their weak cases and going to court on the cases that were most likely to win.

George M. Cohen, a law professor at the University of Virginia, complained to the Federal Trade Commission that the settlement was an “antitrust conspiracy in which plaintiffs’ lawyers have ganged up ‘to coerce claimants into joining the settlement . . . by depriving them of the ability to be represented by the best qualified lawyers.’ ”[[4]](#footnote-4)A court approved the settlement, and 99.9 percent of the 58,022 eligible claimants participated in it. One law firm representing plaintiffs heralded the arrangement as “a model for future mass tort cases.”[[5]](#footnote-5)

What kinds of settlements are included under the “aggregate settlement” umbrella?

Professor Howard Erichson answers this question.

It is odd, considering how often lawyers engage in aggregate settlements, that no one seems able to explain what “aggregate settlement” means. . . .

This much is clear: large-scale multiparty litigation generally settles in clusters rather than one claim at a time. With or without the judicial imprimatur of class certification — indeed, with or without formal judicial aggregation of any sort — lawyers often negotiate settlements of sizable portfolios of claims. Such settlements, in which multiple plaintiffs’ claims against a common defendant are resolved together, are what lawyers variously call aggregate settlements, group settlements, block settlements, or similar terms that emphasize the collectiveness of the deals.[[6]](#footnote-6)

How do the Model Rules guide lawyers in making aggregate settlements?

Rule 1.8(g)

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Comment 13 after Rule 1.8 elaborates the disclosure and consent requirements:

Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients’ informed consent. In addition, Rule 1.2(a) protects each client’s right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. . . . Before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, *including what the other clients will receive or pay if the settlement or plea offer is accepted*. . . .

The Supreme Court of Louisiana interpreted this rule to require that a lawyer making an aggregate settlement must communicate directly with each client, explaining to each client what share of the settlement the others are to receive. The court said that it was not sufficient for the lawyer to deputize one client to confer with others.[[7]](#footnote-7)

In 2006, the ABA ethics committee issued an opinion interpreting this rule.[[8]](#footnote-8) The opinion reads the rule to require lawyers to disclose to each client the total amount of the settlement, “the details of every other client’s participation in the aggregate settlement,” and the amount of fees and costs to be paid to the lawyer from the settlement.[[9]](#footnote-9) Usually, lawyers are obliged to protect as confidential the terms of a proposed settlement. Therefore, the ABA ethics opinion explains, “the lawyer first must obtain informed consent from all his clients to share confidential information among them.” Also, the lawyer should advise each client that if any client refuses the settlement offer, the defendant may withdraw it.

Diane Karpman, a lawyer in California, commented at an ABA ethics conference that these disclosure and consent rules are “requirements that are difficult or impossible to accomplish in practice.”[[10]](#footnote-10) Similarly, Paul Rheingold, a plaintiffs’ mass tort lawyer, commented that “his method of apportionment [of a settlement among a group of clients] would have to include a value matrix taking account of aspects of each plaintiff’s case, such as the person’s unique morbidity factors and individual attributes as a [potential] witness.” He noted that to disclose the application of these factors to each client would strain decency as well as confidentiality. For example, the lawyer would have to tell every client that a particular client would receive a relatively small share because she was near death or would not make a credible witness. He also urged that obtaining the unanimous consent of dozens of clients would usually prove impossible.[[11]](#footnote-11) If Karpman and Rheingold are correct, lawyers take terrible risks by participating in aggregate settlements because making the required disclosures can be nearly impossible and failure to make the disclosures could result in financial penalties. Several courts have stated that fee forfeiture is an appropriate penalty for failure to comply with Rule 1.8(g), even if no client is injured by a failure to disclose.[[12]](#footnote-12) Forfeiture could involve a loss of millions of dollars for lawyers with large “portfolios” of tort claims.

On the other hand, Professor Lynn A. Baker interprets Rule 1.8(g) as making it easier rather than harder for lawyers to agree to aggregate settlements. She acknowledges that there is “no obvious consensus” of authorities on either how to define an aggregate settlement or how detailed the disclosures have to be. She argues that the effect of the rule is to excuse lawyers in aggregate settlement cases from the requirement of Rule 1.7(b)(1) that they reasonably believe that they could provide competent and diligent representation to each client, provided that they make the disclosures required by Rule 1.8(g).[[13]](#footnote-13) Baker offers an example of how the rule should work in practice. She suggests that lawyers would not have to describe clients’ symptoms to other clients, nor to identify to clients the other clients who were receiving different sums of money. In an asbestos case, she suggests, it would suffice to tell each claimant that all clients diagnosed with mesothelioma (the most serious consequence of exposure) would receive $100,000, while those with non-malignant diseases would get only $15,000.[[14]](#footnote-14) It remains to be seen whether Rule 1.8(g) and the 2006 ethics opinion are workable in a world of mass injuries and mass claims.

Rule 1.8(g) is not limited to mass torts. It applies as well to situations in which a lawyer represents two parties and is offered a single lump-sum settlement to be apportioned between them. It apparently requires the informed consent from each client, confirmed in a writing signed by each client, after the appropriate disclosures.[[15]](#footnote-15)

1. See, e.g., Castano v. American Tobacco Co., 84 F. 3d 734 (5th Cir 1996); Amchem Products v. Windsor, 521 U.S. 591 (1997). But see cases such as Martin v. Behr Dayton Thermal Products, 896 F. 3d 405 (6th Cir. 2018) (one of several more recent cases permitting class actions in the context of a mass tort). Professor Linda Mullenix describes how lawyers were at first successful in bringing class actions in mass tort cases until the mid-1980s, when both the Supreme Court and Congress limited the procedure. At that point, lawyers turned to aggregate settlements as an alternative. Mullenix observes that “like one’s parents’ old music, for this new [post-1980s] generation . . . the class action rule seems a dated (if not embarrassing) passion of a previous generation. . . .” Linda S. Mullenix, Reflections of a Recovering Aggregationist, 15 Nev. L. J. 1455, 1466 (2015). Mullenix does not believe this is a positive development. She observes that “in the twenty-first century the pervasive aggregate litigation conversation centers on attorney fees. . . . [A]n unattractive *sub rosa* ‘greed is good’ mentality seems to pervade the modern aggregate litigation landscape; the idealism that characterized old-school class action lawyers [with their emphasis on deterring and punishing wrong-doing, and providing compensation to small claimants] seems a naïve artifact of an earlier era.” Id at 1476-77. [↑](#footnote-ref-1)
2. . Howard Erichson, A Typology of Aggregate Settlements, 80 Notre Dame L. Rev. 1769, 1772 (2005). [↑](#footnote-ref-2)
3. . A similar issue arises in the context of criminal cases, when a lawyer represents several co-defendants and the prosecutor offers a single plea agreement to which all of the defendants must consent. [↑](#footnote-ref-3)
4. . Adam Liptak, In Vioxx Settlement, Testing a Legal Ideal: A Lawyer’s Loyalty, N.Y. Times, Jan. 22, 2008. Professor Cohen’s letter is available at http://www.pointoflaw.com/archives/004680.php (last visited Oct. 4, 2015). [↑](#footnote-ref-4)
5. . Beasley Allen, Vioxx Settlement Wraps Up, Jere Beasley Report (Sept. 14, 2010), http://www.jerebeasleyreport.com/2010/09/vioxx-settlement-program-wraps-up/. [↑](#footnote-ref-5)
6. . Erichson, supra n. 123, at 1769 (explicating a typology of aggregate settlements and explaining his view of how the disclosure rule should apply to the various types of settlements). [↑](#footnote-ref-6)
7. . In re Hoffman, 883 So. 2d 425 (La. 2004). [↑](#footnote-ref-7)
8. . ABA, Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-438. [↑](#footnote-ref-8)
9. . ABA Annotated Model Rules of Professional Conduct 149 (6th ed. 2007). [↑](#footnote-ref-9)
10. . Attorney Diane Karpman, quoted in Limits on Aggregate Settlements Could Bind Usefulness of Nonclass Multiplaintiff Lawsuits, 75 U.S.L.W. 2767 (June 19, 2007). One of the problems is the difficult logistics of communicating fully with hundreds of different plaintiffs. Another is that some will decline to settle, or demand different terms, after they receive full explanations, and any changes in the terms at that stage may cause the defendant to refuse to settle. Also note that since the details of a settlement are affected by a particular offer, it is impossible to obtain advance consent (e.g., in a retainer). [↑](#footnote-ref-10)
11. . Id. (presentation of Paul Rheingold). [↑](#footnote-ref-11)
12. See cases collected in Lynn A. Baker, Aggregate Settlements and Attorney Liability: The Evolving Landscape, 44 Hofstra L. Rev. 291, 292 n. 2 (2015). [↑](#footnote-ref-12)
13. Id. at 316-18. [↑](#footnote-ref-13)
14. Id. at 320. [↑](#footnote-ref-14)
15. . See Straubinger v. Schmitt, 792 A.2d 481 (N.J. Super. Ct. App. Div. 2002) (where claims of passenger and driver in the aggregate exceeded the defendant’s insurance limit; it was not proper for the lawyer to continue to represent both plaintiffs absent informed consent). Problem 6-4, The Injured Passengers, Scene 2, presents such a situation. [↑](#footnote-ref-15)